Petition

81-2177

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No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

VINCENT BELTEMPO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

GERALD ALCH,
MARTIN G. WEINBERG,
OTERI, WEINBERG & LAWSON,
75 Blossom Court,
Boston, Massachusetts 02114.
(617) 227-3700

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

1. Whether an application containing facts which are *equally consistent* with the existence or non-existence of evidence observed fifty-two days before, *support the issuance* of a search warrant predicated exclusively on the legal standard of a "common sense view."

2. Whether the Government's conducting of scientific tests on physical evidence seized from the petitioner when such tests would necessarily destroy such evidence and when, without cause, the arrested petitioner was not put on notice so his due process right to independent analysis could be actualized mandates suppression.

Table of Contents.

Opinion below	2
Jurisdiction	2
Statement of the case	2
Reasons for granting the writ	6
The decision below raises the significant problem of distinguishing when the proper application of the "common sense view" to facts equally consistent with the existence and non-existence of evidence should authorize the issuance of a search warrant	6
The decision below condones the government's knowing destruction of crucial evidence during scientific tests without notice to petitioner which obviated his due process independent analysis rights	10
Conclusion	16

Table of Authorities Cited.

Cases.

Aguilar v. Texas, 378 U.S. 108 (1964)	9
Andresen v. Maryland, 427 U.S. 463 (1976)	7
Brady v. Maryland, 373 U.S. 83 (1963)	12, 13
Brinegar v. United States, 338 U.S. 160 (1949)	5
Dubose v. Lefevre, 619 F.2d 973 (2d Cir. 1980)	15
Durham v. United States, 403 F.2d 190 (9th Cir. 1968)	7
Giordenello v. United States, 337 U.S. 480	8
Loraine v. United States, 396 F.2d 335 (9th Cir. 1968)	15
Napue v. Illinois, 360 U.S. 264 (1959)	15
Sgro v. United States, 287 U.S. 206 (1932)	6

Spinelli v. United States, 393 U.S. 410 (1969) 9
State v. Ingram, 445 P.2d 503 (Or. 1968) 8
States Marine Lines, Inc. v. Federal Maritime Com'n, 376 F.2d 230 (D.C. Cir. 1967) 11
United States v. Brinklow, 560 F.2d 1003 (10th Cir. 1977) 8
United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971) 13
United States v. Bufalino, 576 F.2d 446 (2d Cir. 1978) 14
United States v. Charest, 602 F.2d 1015 (1st Cir. 1979) 7
United States v. Gaultney, 606 F.2d 540 (5th Cir. 1979) 12
United States v. Grammatikos, 633 F.2d 1013 (2d Cir. 1980) 14
United States v. Kahn, 472 F.2d 272 (2d Cir. 1973) 13
United States v. Kelly, 420 F.2d 26 (2d Cir. 1969) 12, 14
United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) 13
United States v. Love, 482 F.2d 213 (5th Cir. 1973) 13
United States v. Perry, 643 F.2d 38 (2d Cir. 1981) 8

STATUTES.

United States Constitution, Fifth Amendment, Due Process Clause 11
21 U.S.C.
§ 841(a)(1) 2
§ 952(a) 2
§ 960(a)(1) 2
§ 963 2
28 U.S.C. § 1254(1) 2
Federal Rules of Criminal Procedure
16(A)(1)(c) 11
16(d)(2) 13

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OCTOBER TERM, 1981.

VINCENT BELTEMPO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioner, Vincent Beltempo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 23, 1982.

Opinion Below.

The opinion of the Court of Appeals, appears in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on March 23, 1982. The instant petition was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statement of the Case.

Vincent Beltempo, charged with having conspired unlawfully to import heroin in violation of 21 U.S.C. § 963 (Count I), with twice having unlawfully imported heroin, first on January 17, 1981, and then on February 7, 1981, in violation of 21 U.S.C. §§ 952(a) and 960(a)(1) (Counts III and VI), and with twice having unlawfully possessed heroin intending to distribute it in violation of 21 U.S.C. § 841(a)(1) (Counts IV and VII), was found guilty on all five counts. He is presently serving concurrent terms of fifteen years imprisonment on each count, having been fined $25,000 on each count, for a total fine of $125,000 and was given lifetime special parole on the substantive counts.

The respondent's principal witness at trial was Antonia Ganguzza, who testified, under a grant of immunity, that on February 7, 1981, she and others flew from Sicily to New York carrying heroin concealed in false-bottom suitcases; that there-

after, they went to petitioner's apartment in Manhattan where a screwdriver was used to punch a hole in the center of one of the suitcases; that white powder spilled onto the rug; that a knife and hammer were utilized to chisel around the outside of the suitcase so that the outer shell could be removed; and that taped inside were thin packets of heroin. On April 1, 1981, fifty-two days after the date on which Ganguzza, according to her testimony, had been present in the apartment, an application for search warrant was made by Special Agent Stia of the D.E.A. On information and belief, he alleged that there was *presently* being concealed at apartment 12-M, 400 East 71st Street, New York, "traces of heroin, and screwdrivers, hammers and other tools used for extracting heroin from false bottom suitcases." His allegation relied on the information from Ganguzza, subpoenaed by the opinion of an unnamed D.E.A. chemist, that traces of heroin can be found in a rug "even after a period of some months," as well as in a vacuum cleaner bag, or on tools, if used in relation to the suspected heroin traces.

A search warrant was issued to examine the apartment for these traces. The search, conducted by D.E.A. chemist Stanley Blashof, resulted in seizures of evidence from a vacuum cleaner bag, screwdriver, and from the floor of the living room rug. Scientific tests conducted by Blashof, after petitioner's arrest — without notice to petitioner or his counsel, and with knowledge of Blashof that the seized evidence would be destroyed by the tests — resulted in Blashof's findings which alone provided reliable corroboration for witness Ganguzza.

The only other evidence against the petitioner consisted of the traces of heroin found in his apartment and the corroborative documentary evidence indicating that the petitioner went to Italy in January of 1981. Clearly then, the destruction of evidence that would have aided the impeachment of the Government's key witness was crucial. In this context, the

denial of any impeaching evidence could have materially affected the outcome of the case. However, the seized sweepings were more than merely possible impeaching evidence. As characterized by the Government during its closing argument, this was the strongest corroborative evidence against the petitioner. It was regarding this evidence, that the petitioner was denied his right to contest, because of its intentional destruction by the Government.

At trial, Mr. Blashof first testified that he analyzed the contents of false-bottom suitcases seized at J.F.K. Airport from a codefendant on February 7, 1981. He stated that the large quantity of powder seized at the airport was heroin. Further, he testified that the powder was between 20-23% pure heroin and that remainder of the powder contained procaine and cornstarch, and traces of papevarine, nocopine, acetyl codeine and acetyl morphine. These tests were conducted before April 1, 1981.

Blashof then testified as to the search of the petitioner's apartment. He testified he conducted nine separate tests of an ounce of sweepings from the living room rug from which he concluded the existence of traces of heroin and cocaine. The testing process destroyed all of the seizures that had been taken from the living room rug. Mr. Blashof stated that he conducted no tests to determine whether the traces found on the rug came from the same batch of heroin that was seized at the airport. *For example, he failed to conduct any tests to determine whether the heroin traces seized on April 1, 1981, contained procaine or cornstarch, or any other material mixed in the February 7, 1981 heroin seizure. Mr. Blashof admitted he could have tested the material for the presence of procaine and cornstarch but that he was not looking for these substances.* Mr. Blashof also testified as to the seizure of a vacuum cleaner from the petitioner's apartment. Similar tests were conducted on the contents of the vacuum cleaner. The results indicated

the presence of traces of heroin and cocaine. The seizures from the interior of the vacuum bag were also destroyed by the Government's testing process.

Lastly, Mr. Blashof testified as to the fact that tests on the screwdriver revealed the presence of heroin. In addition, the screwdriver alone was tested for the presence of procaine; the results of such tests were negative. All of the evidence regarding these tests were consumed as well. *Mr. Blashof stated that he conducted no tests to determine how long the traces of heroin were in the apartment.*

The fact that the testing process would destroy all of the evidence found in petitioner's apartment was known and anticipated by the Government, yet the petitioner was never in any way advised in advance of the test process, nor was he afforded the opportunity to have a privately-retained chemist attend in his behalf, despite his having been arrested prior to the seizures or the tests.

Petitioner moved to suppress evidence of the heroin traces found in his apartment, alleging insufficiency of probable cause with regard to the information upon which the procurement of the search warrant was based, as well as his denial of due process because the respondent destroyed the evidence actually seized. These motions were denied by the trial court, and the rulings were upheld by the court below.

Moreover, the chemist's opinion is not drawn in terms sufficiently strong to establish probable cause. The affidavit states that traces *may* be found, indicating merely the realm of possibility. This is not the basis upon which a man of reasonable caution should conclude that the evidence to be seized would be located at the place to be searched. Cf. *Brinegar* v. *United States*, 338 U.S. 160 (1949).

The court below held that common sense dictates the likelihood that "traces of the spilled narcotic were likely to remain in the rug", and that the "tools used to pry open the false bot-

toms of suitcases are ordinarily kept on the premises and not likely to have been washed or cleaned." Surely the desire to remove any and all incriminating evidence is just as likely, and makes at least as much common sense.

When the "common sense view" standard is so misused so as to create probable cause where none exists, especially when its application is consistent with the non-existence of facts relied upon, a situation arises which warrants review by this Honorable Court.

Reasons for Granting the Writ.

The Decision Below Raises the Significant Problem of Distinguishing When the Proper Application of the "Common Sense View" to Facts Equally Consistent With the Existence and Non-Existence of Evidence Should Authorize the Issuance of a Search Warrant.

The court below declined to focus solely on the duration of time which had passed between the observation of heroin on February 7, 1981, and the issuance of a warrant on April 1, 1981. Instead, a "common sense view" was relied upon as the sole standard for determining the existence of probable cause. But this determination was more of a creation of probable cause, because the facts contained within the four corners of the supporting affidavit equally inferred the presence, as well as the absence, of the sought after objects of the warrant.

In *Sgro* v. *United States*, 287 U.S. 206, 210-211 (1932), the Supreme Court recognized the staleness problem when it stated:

> [I]t is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify

> a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case.

The facts submitted to the judicial officer must establish that the property to be seized will probably be on the premises to be searched. "The most convincing proof that the property was in the possession of the person or upon the premises at some remote time in the past will not justify a present invasion of privacy." *Durham* v. *United States*, 403 F.2d 190, 193 (9th Cir. 1968). As the official instructions to the United States Commissioners states:

> A showing to the effect that the property to be seized was at the place to be searched a substantial time before the application is made does not justify the issuance of a search warrant, for the reason that during the intervening period the property may have been moved away. The facts must show that the property to be seized was known to be at the place to be searched so recently as to justify the belief that the property is still there at the time of the issuance of the search warrant. *Durham* v. *United States, supra*, 403 F.2d at 194, (citing Manual for United States Commissioners 24 (1948)).

The Courts have recognized various factors to aid in determining the line between fresh and stale information in a particular case. These factors include: the nature of the criminal activity, the nature of the item to be seized and whether the activities being investigated are of an ongoing nature. *Andresen* v. *Maryland*, 427 U.S. 463 (1976) (nature of item to be seized); *United States* v. *Charest*, 602 F.2d 1015 (1st Cir. 1979)

(nature of criminal activity under investigation); *United States* v. *Perry*, 643 F.2d 38 (2d Cir. 1981) (ongoing criminal activity).

The application for the search warrant states that the objects of the search were traces of heroin that were spilled on the living room rug. In addition, the warrant sought to seize tools that might have been used to remove drugs from a false-bottom suitcase and/or might contain traces of heroin as well. In determining the nature of the item to be seized, one factor is whether the item sought was contraband or inculpatory per se or likely to be disposed of for any other apparent reason. *United States* v. *Brinklow*, 560 F.2d 1003, 1006 (10th Cir. 1977). Here, one of the items sought was contraband, spilled on the floor, manifesting criminal activity. *Common sense would dictate that the spilled contraband would have been removed almost immediately. This same reasoning would indicate that the tools used to open the suitcase would be cleaned so as not to leave a trace of criminal behavior.* In other cases involving seizures of heroin, delays of one month between the observation of the drug and the application for the warrant have precluded a finding of probable cause. *State* v. *Ingram*, 445 P.2d 503 (Or. 1968).

The only information given to the magistrate as to the likelihood that the evidence could still be found at the apartment after more than fifty days had elapsed was the assertion of an anonymous D.E.A. chemist "that traces of narcotics can be found in a rug even after a period of some months." This bare conclusion of an unnamed chemist is an insufficient basis for the issuance of a warrant. As the Supreme Court stated in *Giordenello* v. *United States*, 337 U.S. 480, 485-487:

> The purpose of the complaint, then, is to enable the appropriate magistrate, to determine whether the "probable cause" required to support a warrant exists. The

> commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complaint's mere conclusion that the person whose arrest is sought has committed a crime.

Here, the affidavit merely sets forth the belief of an unnamed D.E.A. chemist that traces of narcotics might be found after several months. The affidavit is clearly lacking in facts from which the magistrate could determine for himself the reliability of the chemist's belief, or the basis of knowledge upon which his conclusion rests, or his qualifications on the limited issue of the durability of trace amounts of heroin. See *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969). In the present context, the petitioner refers to the lack of facts from which the magistrate could conclude that this unnamed expert was qualified to render the conclusionary opinion that the narcotics could still be found. There was no mention of the name of the chemist, his training, skill or experience. Indeed, there is no indication when the affiant spoke with this chemist in relation to the date of said affidavit. In addition, there is no indication that the chemist was giving an opinion with the facts of this case in mind; for it could well be that the chemist was stating a general proposition, the relevance of which to this case is inapplicable. Did the chemist presume that the apartment had remained in a static condition, uncleaned, and not lived in? The magistrate was provided with none of the predicates used by the unnamed chemist as bases for his opinion.

When the "common sense view" standard is utilized to approve a search warrant, predicated on a finding of probable cause that the evidence sought by the warrant exists, when the application of the *same* "common sense view" standard to the

same facts would require, at minimum, a finding of probable cause that the evidence sought *no longer exists*, creates a situation requiring this Honorable Court to grant review to determine the criteria for determinations of probable cause.

THE DECISION BELOW CONDONES THE GOVERNMENT'S KNOWING DESTRUCTION OF CRUCIAL EVIDENCE DURING SCIENTIFIC TESTS WITHOUT NOTICE TO PETITIONER WHICH OBVIATED HIS DUE PROCESS INDEPENDENT ANALYSIS RIGHTS.

The respondent concedes that its conduct complained of was erroneous in that the petitioner was not notified that seized traces found in his apartment, believed to contain heroin, would be destroyed in the testing process, thereby obviating his opportunity to observe said process and to conduct contemporaneous independent analysis. It is uncontradicted that the respondent knew, beforehand, that the traces of suspected heroin would be destroyed by its tests; nevertheless, they were unilaterally conducted. Does this not constitute "intentional destruction"?

On April 1, 1981, a special agent of the Drug Enforcement Administration and chemist Blashof, pursuant to the challenged search warrant, made seizures from an apartment *then* leased by the petitioner. Three exhibits were offered by the Government; the first, the sweeping from the living room rug; the second, a screwdriver; the third, the contents of a vacuum cleaner bag.

Heroin and cocaine traces were found in the first and third seizures; heroin was found in the second.

Although the chemist, Blashof, admitted knowledge that these seizures were to be tested in relation to the large seizures of February 7, 1981, in order both to connect petitioner to the February 7, 1981 seizures, and to corroborate Ganguzza's

testimony that the seized contraband on February 7, 1981, contained procaine and cornstarch as well as other additives, and further that tests might exist to determine if the April 1 and February 7 seizures were related. Two of the three seized items were *not* subjected to tests for either additive and the third, the screwdriver, was tested for procaine and found to have *none*. Each Government exhibit was subject to multiple tests and was not susceptible after Blashof's examination to independent analysis.

By destroying this evidence, the respondent denied the petitioner the right to conduct an independent examination of the evidence and to present a full and fair defense as guaranteed by the Due Process Clause of the Fifth Amendment.* As the Court stated in *States Marine Lines, Inc.* v. *Federal Maritime Com'n*, 376 F.2d 230, 238 (D.C. Cir. 1967):

> [W]here governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Under Federal Rule of Criminal Procedure 16(A)(1)(c), the petitioner was entitled to inspect the evidence seized from his apartment. A defendant has a right upon request "[t]o inspect . . . tangible objects . . . which are material to the preparation

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*Petitioner was offered an opportunity to examine and test for any scrapings that could be extracted from the vacuum cleaner bag. This was of no consequence, however, for two reasons: (1) the respondent itself had not performed this test, but had merely analyzed the contents of the bag, thus undermining any significance to this "offer"; (2) the scrapings were not the evidence utilized by the respondent to corroborate the testimony of witness Ganguzza.

of his defense, or are intended for use by the Government as evidence in chief at the trial, or were obtained from or belong to the defendant." *Id.* at 355. Here the petitioner was entitled to inspect the seized evidence under all three provisions of this rule. This evidence was material to the preparation of his defense; the respondent used this evidence in its case in chief; and the evidence was taken from the petitioner's apartment.

In addition, the petitioner was entitled to inspect the seized evidence under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Under *Brady*, the due process clause is violated when evidence material to guilt or punishment and favorable to the accused is suppressed. *Id.* at 87. In the present case, Government Exhibits 40 and 41 (living room sweepings and screwdriver, respectively) substances alleged to be heroin were requested for inspection by the petitioner.

Part of the right to inspect is the right to have an independent defense expert examine the seized evidence. As the Fifth Circuit stated in *United States* v. *Gaultney*, 606 F.2d 540, 545 (5th Cir. 1979):

> In cases involving a controlled substance, courts have held a concomitant part of the examination or inspection, to be the right of the accused to have an independent chemical analysis performed on the seized substance.

The Second Circuit has recognized the right to have a defense expert conduct an independent analysis to determine whether the substances seized were, in fact, drugs. *United States* v. *Kelly*, 420 F.2d 26, 29 (2d Cir. 1969).

The proper procedure for the respondent to have followed would have been to inform the court and the petitioner that its proposed tests would destroy the seized traces of the suspected

heroin. If this had been done, the petitioner's own expert could have attended the testing of the sweepings and the screwdriver to assure that proper tests were performed, and to assure that the maximum amount of information was obtained. In *United States* v. *Love*, 482 F.2d 213 (5th Cir. 1973), the court held that where the Government could reasonably expect the testing procedure would consume the evidence, the defendant's expert should have been permitted to participate in the testing procedure.

Under Federal Rule of Criminal Procedure 16(d)(2) the court is empowered to "[p]rohibit a party from introducing evidence not disclosed . . . or enter any other order as it deems just under the circumstances." In addition, under *Brady* v. *Maryland*, *supra*, the Court can order sanctions where there has been noncompliance with the mandates of due process. See *United States* v. *Keogh*, 391 F.2d 138 (2d Cir. 1968); *United States* v. *Kahn*, 472 F.2d 272 (2d Cir. 1973).

In determining whether to apply sanctions against the Government for the destruction of the tapes the Court adopted a four part "pragmatic balancing approach" first outlined in *United States* v. *Bryant*, 439 F.2d 642 (D.C. Cir. 1971), appealed after remand, 448 F.2d 1182 (1971).

> The government has long been on notice of its duty to preserve discoverable evidence and has been repeatedly warned of the jeopardy in which it places its prosecutions when it disregards this obligation. However, . . . sanctions should not be imposed on the government for the loss of such material; rather, the appropriateness and extent of sanctions in such situations depends upon a case-by-case assessment of the government's culpability for the loss, together with a realistic appraisal of its significance when viewed in light of its nature, its bearing upon

> critical issues in the case and the strength of the government's untainted proof.

United States v. *Grammatikos*, 633 F.2d 1013, 1019-1020 (2d Cir. 1980).

> Where, as here, destruction is deliberate, sanction will normally follow irrespective of the perpetrator's motivation, unless the Government can bear the heavy burden of demonstrating that no prejudice resulted to the defendant.

United States v. *Bufalino*, 576 F.2d 446, 449 (2d Cir. 1978).

By destroying the traces of seized heroin in the testing process, the respondent denied the petitioner the opportunity to establish the fact that the traces of heroin found in his apartment did not come from the same batch of heroin as that seized at the airport. Mr. Blashof testified that he made no tests to resolve this issue.

He further testified that he could have conducted tests that would have enabled him to make this determination, but that he failed to do so. The key to making this determination would have been for tests to have been conducted on the traces to determine whether they contained procaine and cornstarch. But, as Mr. Blashof testified, he was not looking for the presence of procaine and/or cornstarch. The existence of testing methodologies that would have been able to determine whether the traces in the petitioner's apartment were from the same batch as the heroin seized at the airport was demonstrated to this Court in *United States* v. *Kelly*, *supra*, 420 F.2d 26 (neutron activation tests used to determine that two separately seized samples came from the same batch).

It should be noted that there was evidence introduced at trial supporting the petitioner's contention that the destroyed evidence was exculpatory. Mr. Blashof testified that the heroin seized at the airport contained 23% heroin, procaine and cornstarch. In testing the screwdriver, however, only heroin was found. Procaine was tested for, but none was found. This is at least some indication that the heroin seized at the airport and the traces found in the petitioner's apartment were not related, in that their components were different.

Assuming the traces of heroin were not destroyed and the petitioner was able to show that the heroin found in the apartment did not come from the quantity seized on February 7, 1981,* this evidence could have been introduced by the petitioner to impeach the testimony of Antonia Ganguzza, upon whose credibility the prosecution's case was primarily based.

This and other Courts have recognized the value of impeaching material and have required reversal of convictions when the Government has suppressed such material or withheld its false nature. See *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Loraine* v. *United States*, 396 F.2d 335 (9th Cir. 1968); *Dubose* v. *Lefevre*, 619 F.2d 973 (2d Cir. 1980).

As indicated in the statement of the case, the critical issue in the case was the credibility of the Government's witness, Antonia Ganguzza.

The refusal of the court below to impose any sanctions upon the respondent would establish a most serious precedent upon which prosecutors would be invited to rely. Does this not justify the grant of certiorari?

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*The seizures of traces of heroin and cocaine together is consistent with private use and thus, if distinguished by independent analysis from the February 7, 1981 seizures, would not necessitate an inference that petitioner was a narcotics trafficker.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Appendix

Appendix.

United States Court of Appeals for the Second Circuit.

Nos. 612, 648, 649 — AUGUST TERM, 1981
(Argued January 26, 1982 Decided March 23, 1982)
DOCKET Nos. 81-1392, 81-1394, 81-1396

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

-AGAINST-

VINCENT BELTEMPO, GIUSEPPE GALLINA, A/K/A "FILLIPO", AND BARBARA WALBERG,
DEFENDANTS-APPELLANTS.

Before:
MESKILL AND CARDAMONE, CIRCUIT JUDGES,
AND HOLDEN, DISTRICT JUDGE.*

Appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York, Mishler, J., on September 11, 1981 which found defendants Beltempo and Gallina guilty and on September 15, 1981 found defendant Walberg guilty on multi-count conspiracy indictments.

Affirmed.

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*Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

GERALD ALCH, Boston, Massachusetts (Joseph S. Oteri, Martin G. Weinberg, James W. Lawson, Oteri & Weinberg, Boston, Massachusetts, of counsel),
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for Defendant-Appellant Walberg.

REENA RAGGI, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Edward R. Korman, United States Attorney for the Eastern District of New York, John Latella, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York, of counsel),
for the United States of America.

CARDAMONE, Circuit Judge:

In February 1981 United States Customs officials at Kennedy International Airport in New York discovered sixteen pounds of heroin concealed in the false bottoms of suitcases belonging to a couple attempting to enter the United States. Carefully deploying their investigative nets the authorities discovered six others whom they indicted along with this couple as part of a conspiracy to smuggle heroin into the country. The indictments charge that from mid-January to mid-February 1981 these eight individuals attempted to smuggle forty — and

actually smuggled twenty-four — pounds of heroin from Palermo, Sicily to New York. In the haul that followed only five of the conspirators were caught; three remain at large. Of the five that were apprehended, one plead guilty on the eve of trial, one was acquitted at its conclusion, the remaining three were found guilty after a jury verdict and are before us on this appeal.

Vincent Beltempo, charged with having conspired unlawfully to import heroin in violation of 21 U.S.C. § 963 (Count I), with twice having unlawfully imported heroin, first on January 17, 1981 and then on February 7, 1981, in violation of 21 U.S.C. §§ 952(a) and 960(a)(1) (Counts III and VI), and with twice having unlawfully possessed heroin intending to distribute it in violation of 21 U.S.C. § 841(a)(1) (Counts IV and VII), was found guilty on all five counts. He is presently serving concurrent terms of fifteen years imprisonment on each count, was fined $25,000 on each count, for a total fine of $125,000, and was given lifetime special parole on the substantive counts.

Giuseppe Gallina, charged with having conspired unlawfully to import heroin in violation of 21 U.S.C. § 963 (Count I), with having distributed heroin abroad intending that it be unlawfully imported into the United States, in violation of 21 U.S.C. § 959 (Count II), and with having unlawfully imported heroin into the United States on January 17, 1981 in violation of 21 U.S.C. §§ 952(a) and 960(a)(1) (Count III), was found guilty on all three counts. He is presently serving concurrent terms of twelve years imprisonment on each count, was fined $25,000 on each count, for a total fine of $75,000, and was given lifetime special parole on the substantive counts.

Barbara Walberg, charged with having conspired unlawfully to import heroin in violation of 21 U.S.C. § 963 (Count I), with having unlawfully imported heroin into the United States on February 7, 1981 in violation of 21 U.S.C. §§ 952(a) and

960(a)(1) (Count VI), and with having unlawfully possessed heroin intending to distribute it in violation of 21 U.S.C. § 841(a)(1) (Count VII), was found guilty on all three counts. She was sentenced to concurrent terms of two years imprisonment on each count, and given eight years special parole on the substantive counts. She is free on bail pending the outcome of this appeal.

THE TRIAL

The government's principal witness at trial was Antonia Ganguzza who stated that in early January 1981 she was romantically involved with Anthony Beltempo ("Tony"), defendant Vincent Beltempo's nephew.[1] Under a grant of immunity she testified that Tony persuaded her to accompany him on a trip to Italy for the purpose of carrying back drugs, for which he agreed to pay her $10,000. On January 13 she, Tony and Paul Galgano[2] flew to Palermo, Sicily where they met Tony's "Uncle Jimmy," identified by her at trial as defendant Vincent Beltempo. Vincent Beltempo later introduced her to a man called "Phillipe," whom she identified in court as defendant Giuseppe Gallina.

On January 15, 1981 Ganguzza, Galgano and the two Beltempos again met with Gallina who took them shopping for the clothing they would need to conceal the packages they planned to carry. Later that day Vincent Beltempo, Gallina, Ganguzza and Galgano went to Gallina's apartment. They were subsequently joined there by Tony Beltempo and Ronald Rizzo.[3] At the apartment Ganguzza and Galgano dressed in the undergarments they had recently purchased, concealing under them ten one-pound packets of heroin. The two Beltempos and Gallina then appraised their appearance to make sure that neither looked "too bulky." That evening Tony Bel-

tempo, Ganguzza, Galgano and Rizzo left for Rome. They were taken to the train station in two cars, one driven by Giuseppe Gallina and one by his brother Salvatore.[4]

The four arrived in Rome on January 16, 1981, carrying the heroin packets. Although they already had round-trip tickets, Tony Beltempo sent Galgano to purchase new return trip tickets to New York for the two of them and Ganguzza because of Vincent Beltempo's warning that the trio might arouse the suspicion of customs officials in New York were their tickets to show too short a stay.

The following day Tony Beltempo, Galgano and Ganguzza prepared to leave Rome and return to New York. Ganguzza concealed seven heroin packets on her body; Galgano concealed three. Tony Beltempo advised the two couriers that when they arrived in New York each should go through customs as if traveling alone. He further warned them not to get excited if they saw him being questioned since his name was in "a computer." Following these directions the two couriers and Beltempo successfully smuggled the drugs through customs at Kennedy Airport and then went to a New Jersey motel where Ganguzza and Galgano gave the heroin packets to Tony Beltempo. The following day Tony Beltempo paid Ganguzza $10,000 for her part in the smuggling venture.

Promised another $10,000 if she would act as a courier again, Ganguzza left New York on Monday, January 26, 1981 arriving in Rome, Italy the following day. She checked into the Metropole Hotel, called Rizzo and arranged to meet him. Rizzo came to the hotel accompanied by a woman whom he introduced as "Barbara," identified by the witness at trial as the defendant Barbara Walberg. In Walberg's presence Ganguzza asked Rizzo "what was going on," where the "stuff" was and when she was to leave. Rizzo told her there was "nothing here yet," and that he "hadn't heard from anybody."

On February 1, 1981 Rizzo telephoned Ganguzza to say that he and Walberg would be coming over to her hotel. They ar-

rived accompanied by a man identified as "Sal," whom Ganguzza recognized from her previous trip as Giuseppe Gallina's brother. Walberg told Ganguzza that there had been a change in plans, that they would all be going first to Sicily and that "Sal" would explain. When the four of them arrived in Sicily they went to the same apartment where Ganguzza had first seen the heroin on her earlier trip. Salvatore Gallina explained that he shared this apartment with his brother "Phillipe," whom he said had returned to New York. Gallina informed the three couriers that instead of carrying the heroin concealed on their bodies, they would carry false bottom suitcases. On the morning of February 7, 1981 Rizzo, Walberg, Ganguzza and Salvatore Gallina left the apartment where they had all been staying and drove to the airport. There the group was approached by a man introduced by Salvatore Gallina as "Joe," identified at trial as the defendant, Giuseppe Aiello.[5] Gallina had told Walberg and Ganguzza earlier that "an Italian" would travel with them from Italy and that the group should act like a family. The flight from Palermo to New York was uneventful and, after she cleared customs, Ganguzza called Tony Beltempo who arranged to meet her in New Jersey.

Beltempo was surprised to learn that these packages of heroin were concealed in suitcases and not carried on the couriers' bodies. Unable to find the heroin packets in the suitcases, he told Ganguzza they would take the suitcases and go meet his "Uncle Jimmy." From there the three of them went to Vincent Beltempo's apartment on the Upper East Side of Manhattan. At the apartment Ganguzza told Vincent Beltempo in more detail about what had happened, while Tony took a screwdriver and punched a hole in the center of one of the suitcases. White powder spilled onto the rug. With a knife and hammer Tony chiseled around the outside of the suitcase until he could remove the outer shell. Taped inside were thin packets of heroin.

On April 1, 1981, pursuant to a search warrant, Drug Enforcement Administration (DEA) chemist Stanley Blashof searched Vincent Beltempo's apartment for traces of heroin. He testified that heroin traces were found in a vacuum cleaner bag, on a screwdriver and in the living room rug.

The defendants raise a number of issues on this appeal, several of which warrant discussion. These contentions will be analyzed in the context of the facts and law applicable to each.

DISCUSSION

I. Vincent Beltempo

The principal thrust of Beltempo's argument before us is that the district court incorrectly failed to suppress evidence of the heroin traces found in his apartment. He claims (1) that the search warrant procured by the DEA was based on information obtained over 50 days prior to the application and that it should therefore fail for lack of probable cause; and (2) that he was denied due process of law because the government destroyed the evidence seized in his apartment.

The application for the warrant was made on April 1, 1981 by Special Agent Stia of the DEA. On information and belief, he alleged that there was presently being concealed at apartment 12-M 400 East 71st Street, New York "traces of heroin, and screwdrivers, hammers and other tools used for extracting heroin from false bottom suitcases." He set forth the source of his information as Antonia Ganguzza who advised him, at an unspecified time, that on February 7, 1981, she smuggled drugs into the United States from Italy in false bottom suitcases. He related that she advised him of her trip to Vincent Beltempo's apartment on the Upper East Side. He stated that investigation revealed the apartment described was leased to

Beltempo. She told him, he continued, of the tools used to open the suitcases and that she observed a small quantity of heroin spilled on the rug in the process. A DEA chemist advised Stia that traces of heroin can be found in a rug "even after a period of some months." He was told that if the rug had been vacuumed, traces may be found in the vacuum cleaner bag and the tools used if they came into contact with heroin might have traces as well.

On the same day Magistrate Raby issued a search warrant to examine the apartment for these traces. Defendant claims that the issuance of this warrant on April 1, 52 days after the date when Ganguzza was in the apartment, was improper because it was based on stale information insufficient to support claimed probable cause to search.

The Fourth Amendment to the Constitution protects against unreasonable searches and seizures by providing that no search warrant shall issue "but upon probable cause." A neutral magistrate must be satisfied that there is "probable cause" to believe that grounds for the application exist before he issues a warrant. Fed. R. Crim. P. 41(c). Probable cause to issue a warrant looks first to the adequacy and reliability of the observation. Specificity assured, currency is considered. To justify a present search probable cause must be current and not rest on facts which existed in the past, unless there is reason to believe those facts are still in existence. 3 C. Wright, Federal Practice and Procedure § 662 at 23 (1969).

The general principles governing the delay between the known existence of facts and the issuance of a warrant were set forth by Chief Justice Hughes in *Sgro* v. *United States*, 287 U.S. 206 (1932). "While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof

meets this test must be determined by the circumstances of each case." *Id.* at 210-11. In viewing the "circumstances" to determine whether probable cause exists in a given case, there should be applied "practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949). Further, in considering whether the time lapse is reasonable, heavy reliance is placed on the nature of the offense. Where the activity is of a continuing nature a greater time lapse is justified than where the offense is an isolated one. Comment, A Fresh Look at State Probable Cause: Examining the Timeliness Requirement of the Fourth Amendment, 59 Iowa L. Rev. 1308 (1974); 68 Am. Jur.2d Searches and Seizures § 70 (1973); see cases collected at Annot., 100 A.L.R.2d 525 (1965).

The question here is whether probable cause existed at the time the warrant issued to believe that the heroin observed on February 7, 1981 was still to be found on Beltempo's rug, or whether so long a period of time had passed as to make it doubtful that the drug was still there. *United States* v. *Ramirez*, 279 F.2d 712, 715 (2d Cir.), *cert. denied*, 364 U.S. 850 (1960); *United States* v. *Brinklow*, 560 F.2d 1003, 1005 (10th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978).

Were this case to be viewed as one involving a continuing offense — and a persuasive argument can be made that conspiracy to smuggle heroin into the United States fits that description — that would end the discussion, for a 52 day lapse would not vitiate probable cause in an ongoing scheme of illegal importation. But the affidavit upon which the search warrant issued contained no allegation that such was the fact. It referred only to the single February 7, 1981 incident when the informant Ganguzza was present in defendant Vincent Beltempo's apartment.

In this isolated incident type of case some courts have focused solely on the element of time that has elapsed. The court in

Schoeneman v. *United States*, 317 F.2d 173, 177 (D.C. Cir. 1963) stated that no case could be found that sustained a search warrant issued more than 30 days after the finding of evidence, and one commentator has concluded that a lapse of more than seven weeks has always rendered a search warrant nugatory, Annot., 100 A.L.R.2d at 527.

Adopting an arbitrary "cut-off" expressed in days or weeks beyond which probable cause ceases to exist, in our view improperly substitutes a rigid formula for the informed judgment which it is the duty of a magistrate to exercise. Factors as important as the time element to be considered in determining the existence of probable cause include the nature of the object sought, its location on the premises and the state in which it was observed. The nature of the object would encompass such considerations as whether it is large or small, moveable or fixed, disposable or permanent and innocuous or incriminating. The location of an object on the premises would involve, for example, whether it was in plain sight on a table, locked in a safe, on a beam in a cellar or secreted behind a bricked-in wall. The state in which the object was seen is especially important today because modern technology and equipment have the sophisticated capacity to ascertain whether matter — in whatever form it may be — is present or even may have once been present. This technology can detect, for example, a blood stain on clothes, furniture or rug; a gas that evaporates; a solid that dissolves and disappears, or one that changes into a powder or a liquid that seeps into a fabric, or dust that is suspended in air and whose particles may later be found on the top ledge of a door. The inquiry with respect to probable cause in the case of an observation of an isolated incident should focus on all of the relevant circumstances, including the element of time lapse, to determine the probability of the continued existence of the object sought at the place where it was last seen. The overall approach should be one of flexibility

and common sense. *Compare United States* v. *Dauphinee*, 538 F.2d 1, 5 (1st Cir. 1976) (search upheld after 30 days elapsed where the objects were hand grenades); *United States* v. *Rosenbarger*, 536 F.2d 715, 719-20 (6th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977) (search upheld where 21 days elapsed in search for possession of firearms); *United States* v. *Steeves*, 525 F.2d 33, 38 (8th Cir. 1975) (search valid after 87 days where object of search was two rifles); *and United States* v. *Rahn*, 511 F.2d 290, 292-93 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975) (warrant for search for weapons upheld after two years, citing *Neal, infra*); *with United States* v. *Neal*, 500 F.2d 305, 309 (10th Cir. 1974) (search warrant invalid after three months lapse where object was stolen credit cards and stolen auto parts); *and Rosencranz* v. *United States*, 356 F.2d 310, 315-18 (1st Cir. 1966) (warrant invalid where no time is alleged in the affidavit as to when the object was last observed on the premises).

Were we merely to count the number of days between Ganguzza's observation and the date of the warrant's issuance, this could arguably be a close case. Even were it to be considered doubtful, however, a presumption of regularity attaches to official acts so that a magistrate's finding of probable cause is itself a substantial factor tending to uphold this validity of the warrant. *United States* v. *Jackstadt*, 617 F.2d 12, 13 (2d Cir. 1980), *cert. denied*, 445 U.S. 966 (1981); *see United States* v. *Ventresca*, 380 U.S. 102, 106 (1965).

In any event this is not a close case when viewed in a common sense manner. The object sought was small and although its possession was incriminating, it was innocuous in its hidden location within the pile of a rug. The heroin sought here was a powder that does not dissolve or evaporate and whose presence an expert indicated lingers for a period of some months. Traces of the spilled narcotic were likely to remain in a rug, even one that had been vacuumed. The tools used by Beltempo

to pry open the false bottoms of suitcases are ordinarily kept on the premises and not likely to have been washed or cleaned. Here a common sense view of all the circumstances belies the contention that a time lapse alone precludes the existence of probable cause. *See Andresen* v. *Maryland*, 427 U.S. 463, 478-79 n.9 (1976). Thus, the validity of this warrant should be upheld.

The issue of the destruction of the heroin traces is more readily disposed of. Intentional destruction is a serious matter that may involve imposition of sanctions, even a new trial. *See United States* v. *Bufalino*, 576 F.2d 446, 449 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978). In *United States* v. *Grammatikos*, 633 F.2d 1013, 1019-20 (2d Cir. 1980), we said "the appropriateness and extent of sanctions in such situations depends upon a case-by-case assessment of the government's culpability for the loss, together with a realistic appraisal of its significance when viewed in light of its nature, its bearing upon critical issues in the case and the strength of the government's untainted proof." We note that this was not an intentional destruction. Rather, it was a good faith loss that came about as a necessary consequence of the method used to analyze the scrapings and sweepings which consumed the heroin in the process.[7] As such it does not invoke the sanction of exclusion of the evidence particularly where, as here, the expert who performed the scientific tests is available for cross-examination. *United States* v. *Love*, 482 F.2d 213, 218-19 (5th Cir.), *cert. denied*, 414 U.S. 1026 (1973); *see United States* v. *Augenblick*, 393 U.S. 348 (1969). In the instant case, moreover, pursuant to Fed.R.Crim.P. 16(a)(1)(D), defendant was offered an opportunity to examine and test for any scraping that could be extracted from the vacuum cleaner bag since only the contents of the bag had been tested, not the bag itself. Under these circumstances, it is difficult to credit defendant's argument that *Brady* material was wrongfully denied him, since there is not

the slightest suggestion that the prosecution suppressed evidence which would have been favorable to him. *Brady* v. *Maryland*, 373 U.S. 83 (1963).

II. Barbara Walberg

Walberg argues that the trial court's exclusion of an exculpatory hearsay statement made by co-defendant Rizzo before a United States Magistrate requires reversal and a new trial.

Rizzo, who plead guilty, and Walberg were the couple traveling from Italy. It was they who were caught by customs inspectors in February at the same time that Tony Beltempo and Antonia Ganguzza successfully smuggled the heroin in their suitcases past the customs officers. The statement sought to be introduced was made by Rizzo when he and Walberg appeared before the United States Magistrate for their initial appearance. Rizzo told the Magistrate that Walberg "had nothing to do with [the smuggling conspiracy]." The proceedings were not transcribed and no written offer of proof was made. Rizzo did not appear as a witness at the trial.

The statement was offered as a declaration against the penal interest of an unavailable declarant. Fed.R.Evid. 804(b)(3) provides, in pertinent part: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." In *Chambers* v. *Mississippi*, 410 U.S. 284, 300-01 (1973), the Supreme Court held that to be admissible the hearsay statement must be made by an unavailable declarant, spontaneously and in close temporal proximity to the crime, corroborated by some other evidence in the case, and self-incriminatory against the declarant's penal interest. This court has also held that Rule 804(b)(3) as well as *Chambers* require corroborating circumstances that clearly indicate the trustworthiness of the

hearsay statement. *United States* v. *Guillette*, 547 F.2d 743, 754 (2d Cir. 1976), *cert. denied*, 434 U.S. 839 (1977).

The district court properly found that declarant Rizzo was unavailable because he asserted his Fifth Amendment right by refusing to testify. *United States* v. *Thomas*, 571 F.2d 285, 288 (5th Cir. 1978). The court also correctly held that the statement made was against his penal interest. It satisfied *Chambers* in that it could be found to be spontaneous and close in time to the crime.

Nevertheless, there was insufficient corroboration in the record to establish the trustworthiness necessary to make Rizzo's hearsay remark admissible. Culling from defendant Walberg's own brief, it appears that Ganguzza, after meeting Rizzo in the Rome hotel lobby and while Walberg was with him, spoke with Rizzo about which method of smuggling would be used. Afterwards, while in Palermo there was "a lot of" drug related conversation among the group of couriers. Brief for Appellant Walberg at 5. Walberg and the others gave their clothing (new clothing that Walberg had just purchased) to Salvatore Gallina to pack in new suitcases for them. She threatened to "turn them in" if any of her recent purchases were lost, *id.* at 6, and expected to be paid for making the trip.[8]

The standard for appellate review of an exclusion under Rule 804(b)(3) is whether the trial court abused its discretion. *United States* v. *Poland*, 659 F.2d 884, 895 (9th Cir. 1981). In light of the above evidence it was not an abuse of the trial court's discretion to exclude Rizzo's hearsay statement.

III. Giuseppe Gallina

Gallina raises several issues, none of which require more than brief discussion.

Defendant contends that the evidence in the record establishes the existence of two conspiracies, but that the proof connects him with only one. He was present in Italy as "Phillipe" on the January body-carry smuggle and he conceded that the proof connects him with that crime. But in February he was in New York City and claims that he could not have been a participant in the illegal importation by false-bottom suitcases. The government asserts that there was only one ongoing conspiracy.

A jury verdict must be sustained where the evidence viewed in a light most favorable to the government supports it. *Glaser* v. *United States*, 315 U.S. 60, 80 (1942). So viewed, the Gallina brothers were heroin suppliers for both the January and February transactions because they had reached an agreement with the Beltempos to furnish heroin in Italy to be smuggled into the United States by various couriers. This proof constitutes the "agreement" which is the gist of the crime of conspiracy. *United States* v. *Borelli*, 336 F.2d 376, 384 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). Unlike *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975), relied upon here by defendant, this is not a "spillover" involving evidence of separate multiple conspiracies and individuals totally unconnected with one another. *See also Kotteakos* v. *United States*, 328 U.S. 750 (1946); *United States* v. *Cambindo Valencia*, 609 F.2d 603 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980). Rather the proof shows this to be a single narcotics distribution scheme involving closely related individuals with a common purpose to effect smuggling by whatever method appeared best at the time. The principal participants and their agreement to smuggle heroin from Italy to the United States by means of couriers remained constant.

Defendant claims that proof is lacking that the substance involved in the January transaction was heroin. The jury found Gallina guilty of conspiracy for both the January and Febru-

ary transaction. The heroin imported in February was intercepted at customs and was in evidence. Further, as defendant concedes, the nature of the substance may be proved by circumstantial evidence. Brief for Appellant Gallina at 20. All the facts considered as a whole — *e.g.*, white powder, $10,000 paid to one courier to carry it, extreme secrecy used, the February shipment was heroin — provide ample circumstantial evidence that the January shipment was also heroin. *See, e.g., United States* v. *Atkins*, 473 F.2d 308, 314 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973); *United States* v. *Fiotto*, 454 F.2d 252, 254 (2d Cir.), *cert. denied*, 406 U.S. 918 (1972).

Question is raised concerning the admissibility of a $20,000 check drawn in 1979 and cashed by defendant at a Swiss bank. The defense attempted to portray Gallina as a person of modest, even reduced, means through the testimony of his wife. The government countered by introducing three checks totalling $75,000 made out to Gallina all dated January 29, 1981 (shortly after the first smuggling trip). There is little dispute about their relevancy and admissibility. At issue is the $20,000 check which was admitted, but was dated November 1979, about 13 months prior to the incidents for which defendant was on trial. The proof showed that it was cashed by defendant at a bank in St. Gall, Switzerland. At trial Gallina objected to its relevancy; he now claims that it tended to show the commission of prior criminal acts.[9]

Mrs. Gallina's testimony had not been restricted to the Gallina's present financial picture. She had stated that her middle-aged husband owned a laundromat and occasionally visited a family meat market in Brooklyn. She said that he went to Italy for the weather and for his heart condition. While there she claimed that they stayed at his father's house because they did not have an apartment of their own. She also testified that they owned only one car, never ate out, never travelled except for health reasons and never even went to the movies. To

create this image of a poor Brooklyn butcher the defense, as in the line from "Oklahoma," went about as far as it could go. We believe that the 1979 check was plainly relevant in view of Mrs. Gallina's testimony.

The last two issues involve severance and the claimed bias of a juror. Neither has merit. First, defendant did not move for severance prior to trial and only moved after the verdict for a new trial on the grounds of improper joinder. Such a motion not having been timely made was waived. Fed.R.Crim. P. 12(b)(5) and 12(f). Second, one of the jurors wrote a love letter to the Assistant United States Attorney and invited her to lunch or dinner. He sent a picture of himself and a poem. In commendable fashion the Assistant United States Attorney brought the entire matter to the attention of the trial court and defense counsel. The circumstances disclosed here are not at all similar to those outlined in *Remmer* v. *United States*, 347 U.S. 227 (1953), where a private communication *to a juror* during a trial required a hearing to determine whether the incident prejudiced the accused on trial. Further, Federal Rule of Evidence 606(b) provides that after a verdict a juror "may not testify as to . . . the effect of anything upon him . . . mind or emotions as influencing him to assent to . . . the verdict. . . ." The many sound reasons for not inquiring into a juror's state of mind are fully set forth in *United States* v. *Dioguardi*, 492 F.2d 70, 78-80 (2d Cir.), *cert. denied*, 419 U.S. 829 (1974). No recognized ground is presented to impeach the verdict on this issue.

With respect to defendant Walberg the mandate of the court shall issue forthwith.

The judgments of conviction is each case are affirmed.

USA v. *Beltempo, et al.*
Docket No. 81-1392

/s/ _____
3/3/82

USA v. *Beltempo, et al.*
Docket No. 81-1392

/s/ _____
3/11/82

FOOTNOTES

[1] Anthony Beltempo, an indicted co-conspirator, is still at large.

[2] Paul Galgano is another indicted but unapprehended co-conspirator.

[3] Rizzo, one of the couriers, plead guilty on the eve of trial and was sentenced to four years incarceration and six years special parole.

[4] Salvatore Gallina, brother of defendant Giuseppe Gallina, is the third co-conspirator still at large.

[5] Aiello, an alleged courier, was acquitted at trial.

[6] The isolated nature of the activity was made plain from the language of the affidavit where the DEA Agent discussed the opening of the false bottomed suitcases using household tools: "In the course of this procedure, a small quantity of heroin was spilled onto the living room rug."

[7] The Government concedes that in the particular circumstances here the better course may have been to notify the defendant that the heroin traces would be destroyed in the process of testing so that the accused could better guard against the claim he now advances.

[8] Walberg's defense was that she was an innocent dupe of Ronald Rizzo with whom this 27 year old defendant was romantically involved. Her parents and a family friend testified that they urged her to take the trip with her boyfriend Rizzo as a chance to see Europe. As the Assistant United States Attorney argued before us, however, this testimony failed to establish her innocent lack of knowledge and was not believed by the jury since no daughter would tell her mother that she was going to Italy to smuggle heroin back into the United States.

[9] Fed.R.Evid. 404(b) provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.